No. 93-699

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,
vs.
CITY OF SAN DIEGO,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 USC § 2106 authorize an evidentiary hearing on an issue that arose during oral argument on an appeal from a grant of summary judgment?

2. Assuming, *arguendo*, that an evidentiary hearing mandated by the court of appeals on remand is considered a hearing on the summary judgment motion, does FRCP 43(e) allow oral testimony?

3. Did Petitioner waive objections to summary judgment by failing to make timely objection and stating on the record that the case could be decided without trial?

4. If the Supreme Court finds procedural error, should a grant of summary judgment be reversed if the alleged error did not involve a genuine issue of material fact?

RULES INVOLVED

This case involves Federal Rules of Civil Procedure 43(e) and 56.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Howard T. Kreisner ("Kreisner") filed suit in 1988 alleging that the City of San Diego ("City") violated the Establishment Clauses of the United States and California Constitutions by allowing a private citizen's group, the San Diego Community Christmas Center Committee, Inc. ("Committee"), a nonparty, to place a long-term holiday display in the Organ Pavilion, an outdoor theater in the City's Balboa Park. This display depicts eight scenes from the New Testament and consists of life-size figures and backdrop paintings accompanied by signs and biblical passages in English and Spanish. Kreisner and the

City each moved for summary judgment. (p at a-68)[1] District Judge William B. Enright determined that the parties did not dispute "the essential facts" (P at a-68), and granted the City's motion on the ground that "the City's practice of allowing the Commitee to display the nativity scene does not violate the Establishment Clause. Given the public forum aspect of the present case, the City's open access policy accommodates both the free speech and the establishment of religion issues of the First Amendment. . . ." (P at a-73).

Petitioner misstates the record when he cites Appellant's Opening Brief at 32 for his contention that the City gave the Committee preferential treatment by allowing it to use the Organ Pavilion for its New Testament display "without following the City's own written pemit regulations." (P at 3). On Appellant's page 32 there is no mention of written permit regulations.

Petitioner states that at oral argument before the court of appeals, "City for the first time alleged the existence of an unwritten, unannounced 'first-come, first-served' permit policy under which it issued permits for the New Testament display." (P at 3). In actuality, counsel for the City responded to questions from the court as to the procedure if some person (other than the Christmas Committee) wanted to erect a display in the area. (T at 36). The court commented with approval on the City's commitment to equal access to the park. (T at 62 & 70). The court further stated that it did not question counsel's representations made in answer to its questions, but was concerned because the first-come, first-served language did not appear in the record below. (T at 63). The court pointed out to petitioner that the City's open-forum policy complied with his demands and that in view of the City's "very liberal . . . attractive policy," the parties should try to settle the case. (T at 65).

The parties did not reach a settlement, so the appellate court vacated the appeal and remanded the case to the district court for

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[1]The Appendices follow the test of this Brief in Opposition. References to Petition for Writ of Certiorari are noted as (P at); references to the Transcript of the hearing at the Court of Appeals are found in Appendix A and are noted as (T at).

"sixty days for the limited purpose of making further factual findings to determine the policies of the City of San Diego with respect to granting permits for the use of Balboa Park." (P at a-75). The court ordered the district court to specify any evidence indicating such policies, and gave the court authorization to amend its conclusions of law in light of any new factual findings. (P at a-77).

Following Judge Enright's recusal, District Judge Marilyn L. Huff scheduled a hearing in response to the remand order. In contradiction to petitioner's statement, City made no motion regarding discovery; rather, petitioner raised the issue but failed to make a Rule 56(f) motion for discovery. Hence, Judge Huff foreclosed discovery sua sponte.

On remand, the district court commented that the procedure was somewhat unusual and inquired of the parties as to their understandings of what the procedure was to be. The City expressed surprise that there would be a hearing and petitioner's counsel stated that he was confused. An expression of confusion, however, is not an "objection" on the record to the notion that the hearing constituted a trial. (P at 4). Petitioner, on the one hand, objected to the proceeding being termed a trial, then stated that "a trial on the merits is required." (P at 5).

City's witnesses testified as to the City's permit procedure and oral policy of first-come, first-served which was reiterated by the district court in the findings of fact:

> This procedure and the City's oral policy of first come, first served has not presented a problem in the past. Until this year . . . the Christmas Committee has been the only entity to request use of colonnades at the Organ Pavilion during the month of December for a display. Regarding other areas of the Park, Scott's staff has been successful in accommodating conflicting uses.

(P at a-81).

The district court's findings of fact also stated that: "The ACLU has complicated the litigation by partially attempting to obtain a permit for an unattended display at the colonnades in the

Organ Pavilion for the month of December 1991." (P at a-82). One day after oral argument a former employee of the ACLU was sent to speak to the City's Park and Recreation representative about the possibility of obtaining a permit for the area in question during the next holiday season. However, no specifics were provided to the City at that time, nor did the ACLU follow through on its request until six months later, in October 1991. (P at a-83).

In the court's finding of facts and conclusions of law, the judge found it "reasonable, in light of the City resources' potentially required, for the City to rely on individuals or groups to pursue any request for a permit and to refuse to follow up on each inadequate request." (P at a-85). The district court made the factual findings as requested by the Ninth Circuit, reaffirmed the earlier court's conclusions of law on the federal claims, and made conclusions of law on the state claims, holding that the City's practice of allowing a private committee to display a nativity scene on a public park did not violate either the federal or state constitution.

Upon receipt of the district court's further factual findings, the Ninth Circuit issued an opinion, on March 3, 1993, which affirmed the grant of City's motion for summary judgment. On August 2, 1993, the court denied Petitioner's motion for rehearing and rejected the suggestion for rehearing en banc. The court also amended its March 3, 1993 opinion and stated specifically *inter alia* that "Kreisner . . . objected to the nature of the district court's findings . . . but did not object to our remand order or to the holding of an evidentiary hearing, nor is there any indication that he did not have sufficient notice to present his case." (P at a-2, a-8, n.3). Petitioner responded, without authority, that the court of appeals was "simply wrong, therefore, when it states that Kreisner did not object to . . . the holding of an evidentiary hearing . . . "(P at 4).

In the original hearing at the appellate court, after considerable discussion of policy and procedure, the court reminded the parties that "[T]he bottom line is still the establishment clause." (T at 66). In its August 1993 opinion, the appellate court upheld the City's motion for summary judgment, stating that "the City

has not violated the Establishment Clause by allowing the Christmas Committee to erect a religious display in the Organ Pavilion." (P at a-29).

REASONS FOR DENYING THE WRIT

INTRODUCTION

The decision of the Ninth Circuit Court of Appeals is not in conflict with the decisions of other United States courts of appeals on the same matter; nor has the court departed from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

I

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10 of the Supreme Court Rules states that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor, and outlines the considerations governing review on writ of certiorari.[1] Cases will qualify for review under this Rule by reason of their importance, novelty, or difficulty — none of which apply to this case. Several Supreme Court justices have discussed the grant of certiorari where there may have been error below and noted that the Supreme Court is not primarily concerned with the correction of minor errors in lower court decisions.[2]

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[1]Rule 10 .1.(a): "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

[2]*Boag v. MacDougall*, 454 U.S. 364, 386 (1982) (Rehnquist, J., dissenting); *Anderson v. Harless*, 459 U.S. 4, 12 (1982), (Stevens, J., dissenting); *Alabama v. Pugh*, 438 U.S. 781, 782-82 (Stevens, J.,

Petitioner's main complaint in the Petition for Certiorari is that the procedure of the appellate and district courts in this case violated judicial precedent and created opportunities for confusion in the lower courts. However, neither the appellate court nor the district court departed from the accepted course of judicial proceedings to such an extent as to require Supreme Court supervision. The court of appeals actually *followed* precedent set by several circuit courts, and direction from this Court as well. In *Network Publications, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212, 215 (11th cir.), the district court cited this Court's decision in *Neely v. Eby Construction Co.*, 386 U.S. 317, 329, (1966): "[I]f appellee presents no new trial issues in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case." And the Ninth Circuit in *Starsky v. Williams*, 512 F.2d 109, 117 (9th Cir. 1975) noted that "[I]n the interests of proper adjudication, we think it best to resolve the confusion by remanding the case to the district court for a decision on the limited questions . . ." In *Zachos v. Sherwin-Williams Co.*, 166 F.2d (5th Cir. 1948) the appellate court stated that it would "direct that the District Court hear further evidence . . . and make findings of fact and conclusions of law thereon, and cause such findings and conclusions to be certified to the Court of Appeals to be considered by it as part of the record on appeal."

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dissenting), cert. denied, 438 U.S. 915 (1978); Robert J. Stern *et al, Supreme Court Practice*, (6th ed. 1986) 28 n.81.

II

COURTS HAVE BROAD DISCRETION IN DISPOSITION OF CASES ON APPEAL

1. Appellate Courts' Discretion on Review.

28 USC § 2106[3] provides appellate courts with power to make such disposition of a case as requried in the interest of justice. Courts, including the U.S. Supreme Court, have long acknowledged this authority. For example, in *Waters v. Thornburgh*, 888 F.2d 870, 876 (D. C. Cir. 1989) the court held, "Once an appellate court has jurisdiction in a case, it has broad discretion to order the appropriate relief. 28 U.S.C. § 2106."

At oral argument in this case, the appellate court expressed concern about documentation on the record of respondent's counsel's reply to the court's questions, so the court remanded to the district court for the limited purpose of making further factual findings. Several courts have approved similar procedures. For example, in *Hunter Douglas Corp v. Lando Products, Inc.*, 235 F. 2d 631 (5th Cir. 1956), the rule was established that a court of appeal retains jurisdiction of action where it makes limited remand for finding of facts. *See also Thompson v. Camp*, 167 F.2d 733 (6th Cir.), cert. denied, 335 U.S. 824 (1948), where the court held that "In spite of the early common law rule to the contrary, it appears now settled that this Court has the authority to limit issues upon remand to the District Court. . . ." This rule has been cited and followed continually. *See Yehia v. Rouge Steel Corp*, 898 F.2d 1178, 1184 (6th Cir. 1990); *Jamison Co., Inc. v. Westvaco Corp.*, 530 F.2d 34, 37 (5th Cir. 1976).

Petitioner claims that the procedure utilized by the appellate court is erroneous simply because it is unusual. However, both

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[3]28 USC § 2106: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

statutes and case law authorize appellate courts to utilize whatever disposition is necessary to ensure the interests of justice.

> [T]he appellate court, if it concludes that a critical issue of ultimate fact has not been sufficiently developed and considered should remand for that purpose rather than deny summary judgment on the ground that there is a triable issue of fact.' That the record below may have been inadequately developed does not transform what would otherwise be an ultimate fact issue proper for summary judgment into a triable issue.

William W. Schwarzer et al, *Summary Judgment Under the Federal Rules: Defining Genuine Issue of Material Fact*, 99 F.R.D. 465, 475 (1982).

2. District Courts' Discretion on Remand

When an appellate court remands a case to the district court, the lower courts are allowed discretion as to the procedure followed on remand. In *Sierra Club v. Penfold*, 857 F.2d 1307, (9th Cir. 1988), the court cited Title 28 § 2106 and said that, "Once remanded, the district court was free to rule not only on the issue directed in the remand, but other issues as well, so long as our mandate did not direct to the contrary." *See also McClure v. O'Henry Awning Co.*, 192 F. 2d 904 (7th Cir. 1951), where upon remand from the court of appeals to the district court for purpose of finding a specified fact, it was the duty of the trial court to resolve the disputed fact and the trial court also had discretion to hear additional evidence on the issue, but could also make findings of fact from the record. In the case before this Court, the amended remand order included directions that "[t]he district court also may amend its conclusions of law in light of any new factual findings." (P at a-77) Accordingly, the district court was free to ensure that all relevant issues received full consideration.

At the beginning of the hearing, the district court had expressed uncertainty about the hearing's purpose (P at 3), but in noting that the appellate court had set a 60-day limit, the court then stated that the procedure was appropriate for purposes of satisfying the court of appeals. The district court told the parties

that with the inclusion of oral testimony, "[C]ertainly you would have the opportunity to cross examine." (P at a-91) Hence, the court alleviated any suggestion that petitioner's right to cross-examine witnesses had been violated. Petitioner, rather than being damaged by the court's taking oral testimony, actually benefitted because he had the opportunity to observe and examine his own witnesses, cross-examine City's witnesses, and make any relevant argument.

III

PETITIONER'S ALLEGATIONS DO NOT WARRANT GRANT OF CERTIORARI

1. Specific Allegations of Procedural Error

a. District Court's Evaluation of Witness Credibility.

Petitioner complains that the district court on remand heard oral argument and then based its decision on evaluation of witness credibility. This argument follows the narrow view that the fact finding was exclusively a summary judgment hearing and witness credibility should not be considered. Assuming, arguendo, that the procedure on remand was a summary judgment hearing, FRCP 43(e)[4] allows oral testimony on motions for summary judgment, and numerous circuit courts have recognized this right. For example, the court in *Hayden v. First National Bank of Mt. Pleasant, Texas*, 595 F.2d 994, 997 (5th Cir. 1979) held that "[R]ule 43(e), which authorizes the use of oral testimony in motions, is applicable to motions for summary judgment, even though Rule 56 is silent on the point." *See also State of Utah By & Through Div. of Parks v. Marsh*, 740 F.2d 799, 801 (10th Cir. 1984), where on a motion for summary judgment, the court ordered an evidentiary hearing at which the relevant factual issue was to be determined.

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[4]FRCP 43(e): "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partially on oral testimony or deposition."

The generally accepted rule is that courts may not base summary judgment opinions on credibility determinations. However, some courts have deviated from the rule in certain cases. In *McLaughlin v. Liu*, 849 F.2d 1205, 1209 (9th Cir. 1987), a case dealing with circumstantial evidence of conspiracy, the court held that "[W]here there is no direct evidence of a conspiracy, the defendant may discharge its summary judgment burden by proffering a 'plausible and justifiable' alternative interpretation of its conduct that rebuts the plaintiff's allegation of conspiracy." *See Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 558 (1986) also a conspiracy case in which this Court stated that "[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists . . . ."

Petitioner's evidence that the City discriminated against the ACLU is totally implausible, and the City's evidence of the open policy plus the fact that no one else had requested a permit for a similar display, was a plausible and justifiable alternative interpretation of its conduct. In addition, although the district court at one point noted that it found respondent's witnesses to be credible, the findings were not based solely on that determination. In its Findings of Fact and Conclusions of Law, the court delineated only one Finding which referenced witness credibility. (P at a-84)

In *Johnson v. Washington Metro. Area Transit Auth.*, 883 F.2d 125, 128-29 (D.C. Cir.), cert. denied, 494 U.S. 1027 (1989), the court noted that "[J]udges may, under certain circumstances, lawfully put aside testimony that is so undermined as to be incredible. . . . when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence. . . ." citing *Law v. Virginia Stage Lines*, 444 F.2d 990 (D.C. Cir. 1971) and *Southern Pacific Co. v. Matthews*, 335 F.2d 924 (5th Cir. 1964), cert. denied 379 U.S. 970 (1965). Here, the district court specifically noted the ACLU's "inadequate attempt to reserve the organ pavilion colonnades one day after oral argument at the Ninth Circuit." (P at a-82) Petitioner, on the other hand, has cited that same ACLU testimony in an attempt to prove that the City did not have the open-forum/open-

access policy represented by counsel at oral argument and noted by two district courts below. (P at a-73; P at a-86).

In its amended opinion of August 2, 1993, the Ninth Circuit specifically found that

> Kreisner cites to no evidence that fees are ordinarily charged to non-exclusive users, nor does he provide any basis for challenging the City's categorization of the Committee's use as non-exclusive. Accordingly, we conclude that the City's grant of a non-fee permit to the committee is consistent with a content-neutral policy and does not violate the Establishment Clause. (P at a-27)

b. Discovery.

Petitioner alleged that he had requested additional discovery, but did not submit an affidavit as required by Rule 56(f).[5] A request for discovery must be specific and not merely a comment to the court. For example, in *United States of America v. One 1985 Mercedes*, 917 F.2d 415, 418 (9th Cir. 1990), the court held that a Rule 56(f) motion must show how additional discovery would preclude summary judgment; *see also Securities and Exchange Commission v. Spence & Green*, 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981) where the court stated that "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." Petitioner's counsel expressed a concern about discovery, but he did not request a continuance and, in fact, agreed to go forward with the hearing.

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[5]FRCP 56(f): "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

c. New Issue Raised on Appeal.

Contrary to petitioner's inference, respondent did not raise a new issue on appeal. The appellate court, in reaction to counsel's response in oral argument, stated that additional facts would be helpful. But in so doing, the appellate court did not create a new procedure in asking for more information. There is precedence for remand for clarification of issues not raised below.

The seriousness of remanding to the district court for further findings on an issue not raised below has not been taken lightly by the courts, but it has been allowed. *See U.S. v. Approximately 2,538.85 Shares of Stock*, 988 F.2d 1281 (1st Cir. 1993), "Only in extraordinary circumstances will we remand for further findings on an issue not timely raised below. . . . (citations omitted). But we find this to be such an extraordinary case."; *see also K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471 (9th Cir. 1974), "[E]xceptional cases or particular circumstances may prompt a review court, . . . to consider questions neither pressed nor passed upon below; power to raise and decide questions sua sponte is, however, to be exercised sparingly and with full realization of restrictions and limitations inherent in its employment."; and *In Re Elmore*, 382 F.2d 125, 127 (D. C. Cir. 1967) where the court cited *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) for the rule that "there may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court below." In this case, the appellate court has commented that it did not disbelieve the representations of City's counsel, but decided sua sponte to remand for further information to aid in making its decision.

d. Standard of Review.

Courts have held that if the procedure at issue is classified a summary judgment motion, the usual standard for review is de novo. However, where there is a mixture of law and fact, as here, courts may combine the two standards of de novo (or plenary) and clearly erroneous review. *See Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1573 (11th Cir.),

cert. denied, 498 U.S. 998 (1990), where the court found a mixed question of law and fact and applied the clearly erroneous rule to the fact portion of the mix and the plenary review standard to the legal component. Here, the court's review was proper since the proceedings were comprised of both summary judgment and evidentiary hearing and the issues presented were a mixture of law and fact.

2. Defects in Petitioner's Case

a. No Genuine Issue of Material Fact.

Respondent's position is that the hearing at the district court on remand took on the character of an evidentiary hearing, rather than a hearing on a summary judgment motion. However, should this Court rule that the hearing was in the nature of a summary judgment motion, respondent would argue that the issue addressed was not a genuine issue of a material fact such that would affect the outcome of the Court's review of the case.

Defining a material fact and distinguishing between a material fact and a genuine issue of law has not been easy. However, this Court has clarified the meaning of a material fact in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986), "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." And the district court in *Barrett v. Craven County Bd. of Ed.*, 70 R.F.D. 466, 478 (1976) provided assistance in discerning a genuine issue, "[A]n issue may be material but not genuine. A pretended issue is one that no substantial evidence can be offered to maintain and is not genuine. (citation omitted) A dispute as to an immaterial fact does not bar summary judgment." A disputed issue may be material, but at the same time not genuine and therefore does not preclude summary judgment.

The attempt of the ACLU to interfere in this case and confuse the issue of the City's relevant policy is a clear example of a pretended issue for which no substantial evidence can be offered to maintain; hence, that is not a genuine issue. *See Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988), "[I]f the factual

context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. (citation omitted) No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *See also Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975), "While the facts embraced . . . are both material and relevant to the issues raised by the pleadings, we reject appellant's efforts to characterize them as *genuine* issues of fact."

b. Waiver of Objection to Proceeding.

Petitioner did not object to the character of the proceedings at oral argument, and, in fact, told the appellate court that, "No. I think you can decide this case without sending us back to, to [sic] trial." (T at 27, 11. 5-8) With that statement, petitioner waived any objection to the proceedings and could not later claim that there are factual disputes and that a trial on the merits is required.

An objection is waived if not timely presented, or if a party participates in the allegedly offending proceeding. *See John Deere Inc. v. Shamrock Industries*, 929 F.2d 413 (8th Cir. 1991), where plaintiff waived notice requirement by briefing and arguing the issue in its own motion for summary judgment, and did not request additional time to respond to defendant's motion; and *U.S. V. Eccles*, 850 F.2d 1357 (9th Cir. 1988), where the court held that a technical defect was not waived by failing to object below since counsel did not actively participate in the oral argument on the motion in the district court. In this case, Petitioner's counsel specifically told the court that he had no objection to proceeding and then participated fully in the argument. As the court in *Trustees of Sabine Carp. H. & W. Fund v. Lightfoot Home Builder*, 704 F.2d 822, 828 (5th Cir. 1983), noted, "[T]o require the district court to give every party who loses another day and thus to grant the loser a replay would be unfair to the party who was prepared and who prevailed."

CONCLUSION

The court of appeal's decision does not meet any of the considerations governing review listed in Rule 10 of the Supreme Court Rules. There is not sufficient conflict with other courts of appeals' decisions on the same matter, nor has the Ninth Circuit in this case so far departed from the usual course of proceedings as to call for this Court's power of supervision.

As the appellate court reminded the parties at oral argument, "[T]he bottom line is still the establishment clause." (T at 66, 11. 13-14). Respondent has stressed the propriety of the procedure on this case up to the present and respectfully reiterates that two district courts have found that the City of San Diego's policy of allowing a private party to erect a display in a public park violates neither the federal nor California constitution. For the foregoing reasons, the Court should deny the writ.

Respectfully submitted,

John W. Witt*
City Attorney

John M. Kaheny
Assistant City Attorney

By Mary Kay Jackson
City of San Diego

APPENDIX A

EXCERPTS OF TRANSCRIPTS

NINTH CIRCUIT COURT OF APPEALS

HOWARD T. KREISNER,
Plaintiff.

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 90-55354

EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF MOTION ON APPEAL

BEFORE: BOOCHEVER, KOZINSKI, and O'SCANNLAIN, Circuit Judges

PASADENA, CALIFORNIA
April 3, 1991 9:00 A.M.

Pgs. 36-37:

THE COURT: Can somebody just sort of go in and plop 'em down in Balboa Park anywhere they want to?

MS. JACKSON: Yes

THE COURT: No permit required?

MS. JACKSON: Yes. Correct.

THE COURT: And, and they would, you are now representing, on behalf of the City, that somedody, if Mr. Kreisner or somebody went in and did that, they would not be removed or prosecuted?

MS. JACKSON: It would depend, Your Honor on the size.

We would have to make sure — it's kind of a first come, first served — we don't want the people punching, we don't want anyone arguing because —

THE COURT: No, no. I understand. Because you're saying —

Let's say that somebody has something about the same cubic feet as this display. And that tomorrow they decided to just plop it down in the middle of the park somewhere, or —

MS. JACKSON: About the same size of this display, they would have to get a, a permit that would be a notification that they wanted to do that, so they would have the right to put it here and nobody else would come up and fight them for that particular spot.

THE COURT: Okay. It would automatically be granted is what you're saying?

MS. JACKSON: Yes.

THE COURT: The permit?

MS. JACKSON: Yes.

THE COURT: And you're presenting this on behalf of your, of the City, you're making a presentation on behalf of the City that you're binding the City to this.

MS. JACKSON: Yes.

THE COURT: Without fee?

MS. JACKSON: Without fee.

THE COURT: For as long as they wish?

MS. JACKSON: Well, I think three to five years or something we'd be getting into a lease situation.

P. 60, 11. 1-25 & P. 61, 11. 1-3:

THE COURT: What I heard the answer was, and we have it on tape, we can — but what I, what I heard the answer was, it's on a first come first served basis, subject to not using the same, um, actual physical space at the same time, uh.

Ms. Jackson did say, for example, they could have a menorah on the middle of the, of the display, right in between the two Christmas displays.

But isn't that the kind of thing that you and she can work out? If, if the kind of detail that you are talking about is really

troublesome, it seems to me that, ah, there's been a very major concession here —

MR. JACOBS: Major concession? I —

THE COURT: That ought to, subject to teasing out the details, ought to resolve any legitimate concerns. No?

MR. JACOBS: And the third argument, and maybe the dispositive one here, is it doesn't matter really, because the courts have held, over and over, that even in a public forum, if there is endorsement, the, the establishment clause trumps and not —

THE COURT: Well, but here is where —

MR. JACOBS: — vice versa.

THE COURT: — you get voiced (phonetic) [hoist] on your robust public forum argument.

Because, if, in fact, things are as Ms. Jackson represents, by the magic of traditional (phonetic) [judicial] admissions, they become traditional (sic) precedence, because she said it.

P. 62, 11. 3-21:

THE COURT: (inaudible) the arguments you're making, because you have a far different situation where the governmental authorities want to depress speech where they don't like the different kinds of speech.

It's not that often one gets a City whose lawyer gets up here, or any kind of government (unintelligible), and they say, look it's okay. We want to create a forum for our citizens, whatever their belief, whatever their religion, whatever their message, you know, subject to not having riots, have them, have them present their views.

And how do you get something like that started if, you know, the first one that comes on the scene they say, well, that's an endorsement because you don't have other things at the same time.

These things get started sequentially, and now you've got this and now they've said, we welcome, invite everybody else

Maybe next year you'll have more things.

P. 63. 11. 15-21:

THE COURT: Is there anything in the record of any City action to create such a public forum?

MR. JACOBS: Not at all.

THE COURT: I'm not questioning the representations that counsel has made.

But we usually look at these matters on the record that comes up to us.

P. 65. 11. 1-16:

THE COURT: That's a very liberal, ah, attractive policy. It's, you know, it, one should be reluctant to — if that's what they want, why not tease it out of them and —

MR. JACOBS: I'm not sure, procedurally how one teases that out. If —

THE COURT: Well, one could try to settle the case.

MR. JACOBS: — you remand for a trial or something —

THE COURT: One could try to settle the case, if you'd like some time to do that. Perhaps — it seems to me that should satisfy, if, in fact, these presentations are what they appear to be and you are only worried about details, it seems to me this requires no — to be satisfied — I don't know —

P. 66, 11. 13-16:

THE COURT: The bottom line is still the establishment clause. Has the city, as a public entity, established religion within the context of all our cases.

P. 70 11. 1-15:

THE COURT: But, it seems like this is a, it's so close to solution that should be acceptable to everybody.

Why don't we defer submission (phonetic) for 30 days?

Ms. Jackson, would you be willing?

And, you're here, it's lunch time. Why don't you go out to lunch together, with Mr. Kreisner, and keep in mind what, what you've been hearing.

You know, it's an attractive solution to have a city say, this is a, it's just something we haven't seen in the law very often, and it ought not to be squelched.

Because, you know, all we can do is have judgments. We can, we can affirm or reverse.

Working out all these nice accommodations is really more in the province of the parties.

MR. JACOBS: I appreciate that, Your Honor, and we will —

APPENDIX B

RULES INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 43(E)

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

FEDERAL RULE OF CIVIL PROCEDURE 56

Appears in Petition for Writ of Certiorari in Appendix C at a-111.